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DATO' SERI ANWAR IBRAHIM v. PP

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASAN LAH FCJ
B ABU SAMAH NORDIN FCJ
ZAHARAH IBRAHIM FCJ
[CRIMINAL APPLICATION NO: 05-47-03-2014(W)]
23 MAY 2016

C ***EVIDENCE:*** *Fresh or further evidence – Application to adduce – Adducing of further evidence at hearing of review application under s. 93 Courts of Judicature Act 1964 – Oral testimony to show pre-arranged plan to frame applicant – Whether r. 137 Rules of the Federal Court 1995 confer upon Federal Court statutory or new jurisdiction to hear application to review its own decision – Whether fell within*
D *exceptional circumstances to justify exercise of inherent jurisdiction under r. 137 – Whether procedure for admission of additional evidence applicable specifically under jurisdiction of appellate court by means of rehearing and not through a reviewing process – Whether use of s. 93 tantamount to abuse of court process*

The applicant, by way of motion, applied for the oral testimony of Dato'
E Ramli bin Yusuff ('Dato' Ramli') to be taken by the court pursuant to s. 93 of the Courts of Judicature Act 1964 ('CJA'). The oral testimony of Dato' Ramli was sought to be used as evidence at the hearing of his application for the exercise of inherent jurisdiction by the court under r. 137 of the Rules of the Federal Court 1995 ('RFC') to review his case. The court
F had earlier dismissed the applicant's appeal against the decision of the Court of Appeal allowing the Public Prosecutor's appeal against the decision of the High Court in acquitting and discharging the applicant for the offence of sodomy punishable under s. 377B of the Penal Code. In the affidavit in support of his application, the applicant exhibited the witness statement
G given by Dato' Ramli as part of Dato' Ramli's sworn testimony in the case of Kuala Lumpur High Court Civil Suit No. S-221-249-2009 ('the civil suit'). The factual circumstances as narrated in the witness statement of Dato' Ramli in the civil suit were in relation to the so-called 'black eye' incident wherein the applicant had suffered injury in his eye as a result of
H being punched by the former Inspector General of Police Tan Sri Abdul Rahim Noor and the alleged conspiracy by the former Attorney General Tan Sri Gani Patail and the former IGP Tan Sri Musa Hassan to stage a cover-up of the incident. The applicant conceded that there is no specific provision in the CJA or in the RFC dealing with the adducing of further evidence at the hearing of a review application. However, the applicant contended that
I it was still open to the Federal Court to invoke its inherent power under r. 137 to permit further evidence to do justice provided that there is no

prohibition in the written law or in the rules and there is no specific provision covering the same topic. The applicant further contended that the evidence sought to be adduced showed a pre-arranged plan similar to the 'black eye' incident to frame the applicant and that the conduct in the earlier case may be used to show an intention to injure the applicant.

Held (dismissing applicant's application)
Per Zulkefli Ahmad Makinudin CJ (Malaya) delivering the judgment of the court:

(1) Rule 137 of the RFC is a declaratory provision that must be strictly confined to procedural matters. The rule gives the Federal Court limited 'inherent power' or 'inherent jurisdiction' to hear any application or to make any order to prevent injustice or to prevent an abuse of the court process. It does not confer upon the Federal Court a statutory jurisdiction or a new jurisdiction to hear any application to review its own decision. Further, r. 137 when applied should not be exercised liberally but sparingly. It is only applicable to very exceptional cases where significant injustice had occurred. It is to remedy any injustice arising from procedural unfairness. (paras 10 & 11)

(2) The applicant's application for admission of additional evidence did not fall within any of the exceptional circumstances to justify the exercise of inherent jurisdiction under r. 137 of the RFC. The proceedings were all carried out in accordance with established legal principles and the applicant's case had undergone a full and lengthy trial and two-tier appeals at the Court of Appeal and the Federal Court. Further, the application was unsustainable since s. 93 of the CJA is only designed for the inclusion of additional evidence in an appeal and not with regard to an application for the exercise of the inherent power of the court to hear an application under r. 137 of the RFC. (paras 11 & 12)

(3) The procedure for admission of additional evidence under s. 93 of the CJA is only applicable specifically under the jurisdiction of the appellate court by means of rehearing and not through a reviewing process. The use of s. 93 of the CJA by the applicant therefore tantamount to an abuse of the court process since the application constituted an attempt to bring additional evidence under a review application. (para 14)

(4) The applicant failed to satisfy s. 93 of the CJA which requires that it is 'necessary' to admit the additional evidence and that failure of justice would result should the additional evidence was not admitted by the court. Based on the records of proceedings before the High Court, Court of Appeal and the Federal Court, the applicant was given a fair trial and hearing. There was an overwhelming amount of evidence available for the court to decide on the guilt or otherwise of the applicant. There was no necessity to resort to outside information. There was also no

involvement of parties alleged to have conspired to fabricate the evidence as to what had allegedly taken place in the black eye incident. (paras 17-19)

(5) The applicant had failed to comply with the pre-requisites in *R v. Parks* that the evidence sought to be admitted was not available at the trial or at the hearing of the applicant's appeal before the Court of Appeal and the Federal Court. The evidence on fabrication of evidence was available throughout the hearing of the appeal of the applicant's case at the Federal Court. Further, the evidence sought to be admitted was irrelevant to the issues raised by the applicant. There was no nexus between the testimony of Dato' Ramli and the defence of the applicant for his case and there was nothing in the testimony of Dato' Ramli that would disclose any evidence in relation to the applicant's defence of political conspiracy. Given that the case on the black eye incident and the conspiracy to fabricate the evidence on the incident had already been concluded, it would be too remote to admit the evidence on the present applicant's case to support his allegation of political conspiracy which is altogether different in cause of action and relevancy. (paras 23-25)

(6) Rule 76 of the RFC requires evidence to be in the form of affidavit and the maker of such affidavit is subject to cross-examination for verification of his statement before it can be used as evidence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. The applicant had not furnished the witness statement of Dato' Ramli in the form of an affidavit but as an exhibit to the applicant's own affidavit. Since the applicant had failed to comply with the statutory requirement of r. 76 of the RFC, the witness statement of Dato' Ramli was not credible evidence. It rendered the applicant's affidavit amounting to hearsay as it attempted to establish the truth of the contents of the witness statement without the maker, Dato' Ramli, being examined on the subject matter. (paras 26 & 27)

(7) The court also found that the witness statement of Dato' Ramli was a hearsay evidence. The evidence of Dato' Ramli was insignificant as the evidence might not have cast a reasonable doubt in the mind of the judges as to the guilt of the applicant if that evidence had been given together with the other evidence at the trial. The order of acquittal and discharge of the applicant at the end of the defence case by the trial judge was not made on the ground of political conspiracy although the trial judge did consider the said defence. (paras 28 & 29)

***Bahasa Malaysia** Headnotes*

Pemohon, melalui usul, memohon agar keterangan lisan Dato' Ramli bin Yusuff ('Dato' Ramli') diterima oleh mahkamah menurut s. 93 Akta Mahkamah Kehakiman 1964 ('AMK'). Keterangan lisan Dato' Ramli dipohon digunakan sebagai keterangan dalam perbicaraan permohonannya

bagi pelaksanaan bidang kuasa sedia ada mahkamah di bawah k. 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KMP') dalam semakan kesnya. Sebelum itu, mahkamah menolak rayuan perayu terhadap keputusan Mahkamah Rayuan yang membenarkan rayuan Pendakwa Raya terhadap keputusan Mahkamah Tinggi melepaskan dan membebaskan pemohon bagi kesalahan meliwat yang boleh dihukum di bawah s. 377B Kanun Keseksaan. Dalam afidavit menyokong permohonannya, pemohon mengekshibitkan kenyataan saksi yang diberikan oleh Dato' Ramli sebagai sebahagian keterangan bersumpah Dato' Ramli dalam kes Mahkamah Tinggi Kuala Lumpur Guaman Sivil No. S-221-249-2009 ('guaman sivil'). Hal keadaan fakta seperti yang diberikan dalam kenyataan saksi Dato' Ramli dalam guaman sivil tersebut adalah berkaitan dengan insiden 'black eye' di mana pemohon mengalami kecederaan pada matanya kerana ditumbuk oleh bekas Ketua Polis Negara, Tan Sri Abdul Rahim Noor dan dakwaan konspirasi oleh bekas Peguam Negara Tan Sri Gani Patail dan bekas KPN Tan Sri Musa Hassan untuk menyembunyikan insiden tersebut. Pemohon mengakui bahawa tiada peruntukan spesifik dalam AMK atau KMP berkaitan dengan pengemukaan keterangan lanjut dalam perbicaraan permohonan semakan. Walau bagaimanapun, pemohon menghujahkan bahawa masih terbuka kepada Mahkamah Persekutuan untuk membangkitkan kuasa sedia adanya di bawah k. 137 untuk membenarkan keterangan lanjut diterima untuk memastikan keadilan dilaksanakan jika tiada larangan dalam undang-undang bertulis atau dalam kaedah-kaedah dan tiada peruntukan spesifik berkenaan tajuk serupa. Pemohon selanjutnya menghujahkan bahawa keterangan yang hendak dikemukakan menunjukkan pelan yang diatur terlebih dahulu menyerupai insiden 'black eye' untuk mengkhianati pemohon dan bahawa tindakan dalam kes terdahulu boleh digunakan untuk menunjukkan niat untuk mencederakan pemohon.

Diputuskan (menolak permohonan perayu)
Oleh Zulkefli Ahmad Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Kaedah 137 KMP adalah peruntukan deklarasi yang terbatas secara ketat kepada perkara-perkara prosedur. Kaedah tersebut memberikan Mahkamah Persekutuan 'kuasa sedia ada' atau 'bidang kuasa sedia ada' yang terbatas untuk membicarakan apa-apa permohonan atau membuat apa-apa perintah untuk menghalang ketidakadilan atau menghalang penyalahgunaan proses mahkamah. Ia tidak memberi kepada Mahkamah Persekutuan suatu bidang kuasa statutori atau bidang kuasa baharu untuk membicarakan apa-apa permohonan untuk menyemak keputusannya sendiri. Selanjutnya, k. 137 apabila digunakan, tidak sepatutnya dilaksanakan secara liberal tetapi secara berhati-hati. Ia hanya terpakai kepada kes-kes yang sangat berkecuali di mana ketidakadilan yang ketara berlaku. Ia adalah untuk membetulkan ketidakadilan akibat daripada ketidakadilan prosedur.

A **(2)** Permohonan pemohon untuk penerimaan keterangan tambahan tidak terangkum dalam mana-mana hal keadaan khas yang mewajarkan pelaksanaan bidang kuasa sedia ada di bawah k. 137. Prosiding-prosiding dijalankan menurut prinsip undang-undang matan dan kes pemohon telah melalui perbicaraan penuh dan panjang dan dua
B peringkat rayuan di Mahkamah Rayuan dan Mahkamah Persekutuan. Selanjutnya, permohonan tersebut tidak boleh dipertahankan kerana s. 93 AMK dibentuk bagi kemasukan keterangan tambahan dalam rayuan dan bukan berkaitan dengan permohonan bagi pelaksanaan bidang kuasa sedia ada mahkamah untuk membicarakan permohonan di
C bawah k. 137 KMP.

(3) Prosedur bagi kemasukan keterangan tambahan di bawah s. 93 AMK hanya terpakai secara spesifik di bawah bidang kuasa mahkamah rayuan secara perbicaraan semula dan bukan melalui proses semakan. Oleh itu, kegunaan s. 93 AMK oleh pemohon bermaksud penyalahgunaan proses
D mahkamah kerana permohonan tersebut membentuk cubaan untuk mengemukakan keterangan tambahan di bawah permohonan semakan.

(4) Pemohon gagal memenuhi s. 93 AMK yang memerlukan bahawa ia adalah 'perlu' untuk menerima keterangan tambahan dan bahawa ketidakadilan akan berlaku jika keterangan tambahan tidak diterima
E masuk oleh mahkamah. Berdasarkan rekod prosiding di Mahkamah Tinggi, Mahkamah Rayuan dan Mahkamah Persekutuan, pemohon telah dibicarakan secara adil. Terdapat banyak keterangan untuk mahkamah memutuskan kesalahan pemohon atau sebaliknya. Tiada keperluan untuk menggunakan maklumat luar. Juga, tiada penglibatan pihak-pihak
F yang didakwa berkonspirasi memalsukan keterangan mengenai apa yang berlaku dalam insiden 'black eye'.

(5) Pemohon gagal mematuhi pra-syarat dalam *R v. Parks* bahawa keterangan yang dipohon untuk diterima masuk tidak didapati semasa perbicaraan atau pendengaran rayuan di Mahkamah Rayuan dan Mahkamah
G Persekutuan. Keterangan pemalsuan bukti sentiasa ada sepanjang pendengaran rayuan kes pemohon di Mahkamah Persekutuan. Selanjutnya, keterangan yang dipohon untuk diterima masuk tidak relevan dengan isu-isu yang dibangkitkan oleh pemohon. Tiada kaitan antara keterangan Dato' Ramli dan pembelaan perayu bagi kesnya dan
H tiada apa-apa dalam keterangan Dato' Ramli yang akan mendedahkan apa-apa bukti berkaitan pembelaan perayu tentang konspirasi politik. Memandangkan kes insiden 'black eye' dan konspirasi pemalsuan keterangan dalam insiden tersebut telah pun diputuskan, adalah terpencil untuk menerima masuk keterangan tersebut bagi kes pemohon
I sekarang untuk menyokong dakwaan konspirasi politik yang secara keseluruhannya berbeza dari segi kausa tindakan dan kerelevenan.

(6) Kaedah 76 KMP memerlukan keterangan dalam bentuk afidavit dan pembuat afidavit tertakluk kepada pemeriksaan balas untuk pengesahan kenyataannya sebelum ia boleh digunakan sebagai keterangan. Keterangan yang boleh dipercayai adalah yang telah ditapis dan telah melalui proses penilaian. Pemohon tidak mengemukakan kenyataan saksi Dato' Ramli dalam bentuk afidavit tetapi sebagai ekshibit kepada afidavit pemohon sendiri. Oleh sebab pemohon gagal mematuhi keperluan statutori k. 76 KMP, kenyataan saksi Dato' Ramli bukan keterangan yang boleh dipercayai. Ia menjadikan afidavit pemohon menjadi dengar cakap kerana ia mencuba membuktikan kebenaran kandungan kenyataan saksi tanpa pembuatnya, Dato' Ramli, diperiksa berkenaan perkara tersebut.

(7) Mahkamah juga mendapati kenyataan saksi Dato' Ramli adalah keterangan dengar cakap. Keterangan Dato' Ramli tidak penting kerana keterangan itu mungkin tidak boleh membangkitkan keraguan munasabah dalam minda hakim-hakim berkaitan kebersalahan perayu jika keterangan tersebut diberikan bersama-sama dengan keterangan lain semasa perbicaraan. Perintah pelepasan dan pembebasan pemohon di akhir kes pembelaan oleh hakim bicara tidak dibuat atas alasan konspirasi politik walaupun hakim bicara mempertimbangkan pembelaan tersebut.

Case(s) referred to:

Asean Security Paper Mills Sdn Bhd lwn. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 2 CLJ 349 FC ***(refd)***
Che Din Ahmad v. PP [1975] 1 LNS 7 HC ***(refd)***
Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 7 CLJ 397 FC ***(refd)***
Gurbachan Singh Bagawan Singh & Anor v. Vellasamy Pennusamy & Ors And Other Applications [2012] 2 CLJ 663 FC ***(refd)***
Khamis v. PP [1971] 1 LNS 48 HC ***(refd)***
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Murugayah v. PP [2004] 2 CLJ 489 CA ***(refd)***
R v. Parks [1961] 3 All ER 633 ***(foll)***
Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim [2008] 5 CLJ 201 FC ***(refd)***
Sooryaprakasam v. Muniswami AIR [1925] Mad 42 ***(refd)***
Sri Nath Shaha v. Ralli [1905] 10 CWN 253 ***(refd)***
Subramaniam v. PP [1956] 1 LNS 115 PC ***(refd)***
Zahira Habibullah Sheikh & Anor v. State of Gujarat & Ors [2004] 4 SCC 158 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 93(1)
Criminal Procedure Code, ss. 317(1), 376(3), 379
Evidence Act 1950, s. 14
Federal Constitution, art. 145(3)
Penal Code, s. 377B
Rules of the Federal Court 1995, rr. 76, 137

Civil Procedure Code 1908 [Ind], s. 151
Criminal Procedure Code 1973 [Ind], s. 391

A *For the appellant - Gopal Sri Ram, Sivarasa Rasiah, CK Lim, Latheefa Koya, Shahid Adli & David Yii; M/s Karpal Singh & Co*
For the respondent - Mohamad Hanafiah Zakaria & Suhaidariah Ahmad; DPPs

Reported by S Barathi

B

JUDGMENT

Zulkefli Ahmad Makinudin CJ (Malaya):

Preliminary

C **[1]** This is an application by the applicant, Dato' Seri Anwar Ibrahim, by way of motion for the oral testimony of Dato' Ramli bin Yusuff ("Dato' Ramli") to be taken by this court pursuant to s. 93 of the Courts of Judicature Act 1964 ("CJA 1964"). The oral testimony of Dato' Ramli is sought to be used as evidence at the hearing of his application dated 30 April 2015 for the exercise of inherent jurisdiction by this court under r. 137 of D the Rules of the Federal Court 1995 ("RFC 1995") to review his case. This court had earlier dismissed on 10 February 2015 the applicant's appeal against the decision of the Court of Appeal in allowing the appeal by the Public Prosecutor against the decision of the High Court in acquitting and discharging the applicant for the offence of sodomy punishable under s. 377B E of the Penal Code.

[2] In the affidavit in support of his application the applicant exhibited the witness statement (exh. AE1) given by Dato' Ramli as part of Dato' Ramli's sworn testimony in the case of Kuala Lumpur High Court Civil Suit No. S-221-249-2009 ("the civil suit"). The factual circumstances as narrated in F the witness statement of Dato' Ramli in the said civil suit are in relation to the so-called "black eye" incident wherein the applicant had suffered injury in his eye as a result of being punched by the former Inspector General of Police Tan Sri Abdul Rahim Noor and the alleged conspiracy by the former Attorney General Tan Sri Gani Patail and the former IGP Tan Sri Musa G Hassan to stage a cover-up of the incident.

[3] We reproduce herein the relevant paras. 18 to 23 of the witness statement of Dato' Ramli relating to the "black eye" incident as follows:

> 18. Q. What was the "Black Eye" incident about?
>
> H A. When Dato' Seri Anwar Ibrahim was initially detained in 1998, the situation was very tense. When Dato' Seri Anwar Ibrahim was produced in Court after his detention, he had a black eye. There was widespread public outrage at what had happened which led to the forming of a Royal Commission of Inquiry to ascertain who had caused Anwar Ibrahim's black eye.
>
> I 19. Q. How were you involved in the "Black Eye" incident?
>
> A. I was the main witness of the "Black Eye" incident which took place on 20.9.1998 and I was the one who pulled Tan Sri Rahim Noor out of Dato' Seri Anwar Ibrahim's cell with the help of

the former Director of CID, Dato' Yaacob Mohd Amin. I was then asked by Tan Sri Musa Hassan who was the then Deputy Director of CID (Legal and Prosecution) to fabricate evidence.

20. Q. How did he ask you to fabricate evidence?

A. A few days after the incident, Tan Sri Musa Hassan came to see me. He informed me that he was sent by the late AG Tan Sri Mohtar Abdullah and Tan Sri Gani Patail. He asked me to lodge a police report against Dato' Seri Anwar Ibrahim to say that he, Dato' Seri Anwar Ibrahim had lodged a false report against Tan Sri Rahim Noor and to arrange for a doctor to give an expert report that Dato' Seri Anwar Ibrahim had inflicted the injuries on himself. This "expert report" was needed to show that Dato' Seri Anwar Ibrahim's injuries were not caused by any assault and to counter and/or neutralise other reports made by various doctors.

21. Q. How did you respond to Tan Sri Musa Hassan?

A. I refused to do it. I told him off and gave him a piece of my mind. I also told him that he and Tan Sri Gani Patail were both at the 30th floor of Bukit Aman on the night of 20.9.1998 and were clearly aware that Dato' Seri Anwar Ibrahim was assaulted. Because of the position that I took, I was seen as disloyal by Tan Sri Musa Hassan and Tan Sri Gani Patail.

22. Q. Did you tell anyone about this?

A. I warned the IO of the case, Dato' Mat Zain, to be careful of Tan Sri Musa Hassan because he was planning to fabricate evidence. A few days later, Tan Sri Norian Mai, the then Deputy IGP called me up and told me not to fabricate evidence and to leave it to Dato' Mat Zain to handle the investigation. I only came to know later on during the RCI hearing that Tan Sri Gani Patail and Tan Sri Musa Hassan went ahead to tender 3 fabricated medical reports prepared by Dr. Abdul Rahman Yusuff.

23. Q. What do you mean when you say that because of the position you took you were seen as disloyal?

A. At the time, I was the Deputy Director of CID. Rightfully, Tan Sri Musa should be reporting to me on the investigations. However, he by-passed police protocols and chose to confer directly with Tan Sri Gani Patail who was then the senior DPP leading the prosecution together with Dato' Azahar bin Mohamed, Dato' Yusof Zainal Abidin, Dato' Nordin Hasan and Tuan Shamsul Sulaiman. At that time there were allegations being made about the authenticity of the evidence in the sodomy trial and I was asked to support Tan Sri Musa Hassan and Tan Sri Gani Patail's version of events. I did not do so. I even cautioned Tan Sri Musa Hassan about his conduct and he was not too happy about it and accused me of circumventing the investigations.

A **Submission Of The Applicant**

[4] Learned counsel for the applicant, Gopal Sri Ram, conceded that there is no specific provision in the CJA 1964 or in the RFC 1995 dealing with the adducing of further evidence at the hearing of a review application. The only provision for the adducing of additional evidence is s. 93(1) of the CJA 1964 which applies to appeal and not to review.

B

[5] However, for the applicant it was contended that it is still open to the Federal Court to invoke its inherent power under r. 137 to permit the further evidence. On our r. 137 there is an equivalent provision in s. 151 of the Indian Civil Procedure Code 1908 for reference. The position taken by learned counsel is that this provision may be invoked to do justice provided that there is no prohibition in the written law or in the rules and there is no specific provision covering the same topic. (See the case of *Sooryaprakasam v. Muniswami* AIR [1925] Mad 42).

C

D **[6]** The point of contention for the applicant is that in this case the Federal Court in its written judgment at para. 205 in dismissing the applicant's appeal held that the allegation of a political conspiracy remained unsubstantiated by any credible evidence. The additional evidence the applicant now seeks admission of relates to similar fact evidence to show a system that is consistent with an intention to frame the applicant. This is relevant evidence under s. 14 of the Evidence Act 1950 and may therefore be relied upon by the applicant to bring home his case. (See the case of *Sri Nath Shaha v. Ralli* [1905] 10 CWN 253, 254-255).

E

[7] It was also submitted for the applicant that this being a criminal case and in particular falling within r. 137, the conditions for the case of *Ladd v. Marshall* [1954] 3 All ER 745 do not apply. Even if this had been an application made in the appeal proper, it is only of necessity that this is a governing factor. It was impressed upon us that in interpreting the similarly worded s. 317(1) of our Criminal Procedure Code ("CPC") and s. 391 of the Indian Criminal Procedure Code, courts should hold that the discretion is to be exercised in the interests of justice. (See the case of *Zahira Habibullah Sheikh & Anor v. State of Gujarat & Ors* [2004] 4 SCC 158 at 179).

F

G

[8] Learned counsel for the applicant further contended that in our present case the evidence of Dato' Ramli sought to be adduced shows a pre-arranged plan similar to the "black eye" incident to frame the applicant. The conduct in the earlier case may be used to show an intention to injure the applicant. At this stage the court is only concerned with the admissibility of the evidence and not its weight. The probative value that is to be attached to the additional evidence is a factor that only arises when considering the evidence in the context of the application to review.

H

I

Submission Of The Respondent

[9] The respondent opposed the applicant's application essentially on two main issues. Firstly, it is the contention of the respondent that s. 93 of the CJA 1964 cannot be invoked in regard to an application for a review under r. 137 of the RFC 1995. Secondly, the additional evidence that is sought to be admitted does not meet the threshold requirement as specified by the relevant laws and under the principle laid out in the decided case authorities.

Decision

[10] We shall first deal with the first issue as to whether s. 93 of the CJA 1964 can be invoked with regard to an application under r. 137 of the RFC 1995. It is our considered view that the scope and application of r. 137 of the RFC 1995 is well settled. Rule 137 is a declaratory provision that must be strictly confined to procedural matters only. Rule 137 gives the Federal Court the limited "inherent power" or "inherent jurisdiction" to hear any application or to make any order to prevent injustice or to prevent an abuse of the court process. It does not confer upon the Federal Court a statutory jurisdiction or a new jurisdiction to hear any application to review its own decision. It does not provide for a means of an appeal to the Federal Court against its own decision. (See the cases of *Dato' Seri Anwar Ibrahim v. PP* [2010] 7 CLJ 397; [2011] 1 MLJ 158 and *Sia Cheng Soon & Anor. v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201; [2008] 3 MLJ 753).

[11] We are also of the view that r. 137 when applied should not be exercised liberally but sparingly. It is only applicable to very exceptional cases where significant injustice had occurred. It is to remedy any injustice arising from procedural unfairness due to circumstances such as coram failure, infringement and wrong application of statutory laws; decision obtained by fraud or suppression of evidence; breach of the rule of natural justice or that the decision was tainted by actual bias or a real danger of bias on the part of one or more members of the panel hearing the case. (See the cases of *Asean Security Paper Mills Sdn Bhd lwn. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 CLJ 349; [2008] 2 MLJ 137 and *Chia Yan Tek & Anor. v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61). Based on these decided case authorities it is our finding that the applicant's application for admission of additional evidence does not fall within any of the exceptional circumstances to justify us to exercise our inherent jurisdiction under the said r. 137. It can be examined and concluded from the records of proceeding of the applicant's case that the proceedings were all carried out in accordance with established legal principles. It is to be noted here that the applicant's case had undergone a full and lengthy trial and two-tier appeals at the Court of Appeal and the Federal Court.

[12] Further, it is our judgment that the applicant's application is unsustainable as s. 93 of the CJA 1964 is only designed for the inclusion of additional evidence in an appeal before this court and not with regard to an

application for the exercise of the inherent power of the court to hear an application under r. 137 of the RFC 1995. Section 93 of the CJA 1964 provides as follows:

> (1) In dealing with any appeal in a criminal case the Federal Court may, if it thinks additional evidence to be necessary, either take such evidence itself or direct it to be taken by the High Court.
>
> (2) When the additional evidence is taken by the High Court, it shall certify the evidence, with a statement of its opinion on the case considered with regard to the additional evidence to the Federal Court, and the Federal Court shall thereupon proceed to dispose of the appeal.
>
> (3) The parties to the appeal shall be present when additional evidence is taken
>
> (4) In dealing with any appeal in a criminal case the Federal Court may also, if it thinks fit, call for and receive from the High Court a report of any matter connected with the trial.

[13] We agree with the submission of the learned DPP that the jurisdictions in relation to appeals are provided for separately from that over applications for the exercise of inherent jurisdiction under r. 137 of the RFC 1995. The two jurisdictions – one in relation to appeals and the other in relation to reviews – cannot be said to be one and the same but are legally distinct and different in their scope of application. On this point the Federal Court in the case of *Gurbachan Singh Bagawan Singh & Anor. v. Vellasamy Pennusamy & Ors. And Other Applications* [2012] 2 CLJ 663; [2012] 2 MLJ 149, at p. 679 (CLJ); p. 162 (MLJ) had this to say:

> a review application under rule 137 of the Rules should not be equated with an appeal process.

[14] We are of the view that the procedure for admission of additional evidence under s. 93 of the CJA 1964 is only applicable specifically under the jurisdiction of the appellate court by means of rehearing but not through a reviewing process. The use of s. 93 of the CJA 1964 by the applicant is therefore tantamount to an abuse of the court process since this application constitutes an attempt to bring additional evidence under a review application.

[15] Even assuming that s. 93 of the CJA 1964 can be invoked in regard to an application under r. 137 of the RFC 1995, the applicant has still to meet the next stage requirement of whether the additional evidence sought to be admitted satisfies the requirement as provided for under s. 93 of the CJA 1995; and the requirements under the principles as set out in the case of *R v. Parks* [1961] 3 All ER 633 and other decided case authorities.

[16] We shall now deal with this second issue as to whether the threshold requirement for admission of additional evidence in an appeal and in the context of the present case in a review application has been complied with.

[17] It is to be noted under s. 93 of the CJA 1964, it must be shown that it is "necessary" to admit the additional evidence sought for by the applicant. The applicant has to show that a failure of justice would result should the additional evidence not be admitted by the court. In the conduct of a criminal trial all the necessary evidence available must be produced during the trial stage of the case and not during the appeal stage. A trial cannot be by instalment. Admission of additional evidence at an appellate stage would only be resorted to when the court is of the opinion that such evidence is necessary for the justice of the case and not as a matter of practice. On this point in the case of *Khamis v. PP* [1971] 1 LNS 48; [1971] 2 MLJ 267 His Lordship Sharma J *inter alia* explained that the word "necessary" means that the additional evidence would be admitted if failure to admit it would result in a miscarriage of justice. Thus if the refusal to admit the additional evidence does not lead to a failure of justice, the additional evidence is not deemed necessary for the consideration of the court.

[18] It is our considered view that the applicant has failed to satisfy the requirement of s. 93 of the CJA 1964. Based on the records of proceeding before the trial judge of the High Court and before the Court of Appeal and the Federal Court the applicant was given a fair trial and hearing. In fact at the conclusion of the trial the learned judge of the High Court had acquitted and discharged the applicant. There was an overwhelming amount of evidence available for the court to decide on the guilt or otherwise of the applicant. There is no necessity to resort to outside information.

[19] It is our finding that for the present case there was no involvement of parties alleged to have conspired to fabricate the evidence as to what had allegedly taken place in the black eye incident. The respondent in the affidavit in reply to the applicant's application had categorically denied the involvement of Tan Sri Abdul Gani Patail (the former Attorney General) and Tan Sri Musa Hassan (the former Inspector General of Police) in the fabrication of the evidence in the present case. It was stated that both Tan Sri Abdul Gani Patail and Tan Sri Musa Hassan had discharged themselves from playing a role in the investigation and in the prosecution of the applicant's case. It was further stated that in fact it was Tan Sri Idrus Harun (the former Solicitor General) who gave the decision to prosecute and to appeal against the decision of the High Court in acquitting and discharging the applicant.

[20] It was further submitted for the respondent that in the interest of justice the Attorney General had appointed a third party to carry out the appeal process in the applicant's case at the Court of Appeal and at the Federal Court due to the fact that the Attorney General's Chambers of Malaysia was claimed to be biased towards the Government and practised selective prosecution in framing the charge against the applicant. In doing so Tan Sri Muhammad Shafee Abdullah was duly appointed under s. 376(3) and

s. 379 of the CPC read together with art. 145(3) of the Federal Constitution to conduct and lead the prosecution team at the hearing of the appeals at the Court of Appeal and the Federal Court. On the allegation of conflict of interest against Tan Sri Muhammad Shafee Abdullah on his appointment the Federal Court in their decision found Tan Sri Muhammad Shafee to be a fit and proper person to be appointed under s. 376(3) of the CPC as no evidence was tendered by the applicant to prove that there was such a conflict of interest.

[21] We shall now deal with the issue as to whether the principles laid down in the case of *R v. Parks (supra)* for admission of additional evidence have been complied with by the applicant. The English Court of Criminal Appeal in *R v. Parks* decided to expand the jurisprudence and requirements as propounded in *Ladd v. Marshall (supra)* for admission of additional evidence and ruled that four requirements need to be adhered to as follows:

> Firstly, the evidence that is sought to be called must be evidence which was not available at the trial.
>
> Secondly, it must be evidence relevant to the issues.
>
> Thirdly, it must be evidence which is credible in the sense that it is well capable of belief.
>
> Fourthly, the Court will after considering the evidence go on to consider whether there might have been reasonable doubt in the minds of the Jury as to the guilt of the accused person if that evidence had been given together with the other evidence at the trial.

[22] As regards the position in Malaysia on the admission of additional evidence the common law principle was adopted into our local jurisdiction wherein our courts have held that the said four requirements have to be fulfilled cumulatively. (See the cases of *Murugayah v. PP* [2004] 2 CLJ 489; [2004] 2 MLJ 545 and *Che Din bin Ahmad v. PP* [1975] 1 LNS 7; [1976] 1 MLJ 289).

[23] We are of the view that the applicant had failed to comply with the prerequisites in *R v. Parks* that the evidence that is sought to be admitted was not available at the trial or at the hearing of the applicant's appeal before the Court of Appeal and the Federal Court. On this point we would refer to the statutory declaration (SD) of a police officer, Dato' Mat Zain bin Ibrahim ("Dato' Mat Zain") affirmed on 7 October 2013 wherein had been highlighted the same allegation on the conspiracy to fabricate evidence in the black eye incident and the persons who had been involved in the said conspiracy. This SD of Dato' Mat Zain was exhibited by the applicant in his affidavit in support affirmed on 5 December 2013 to substantiate his case on the application to disqualify Tan Sri Muhammad Shafee Abdullah as lead counsel in the prosecution's appeal against the acquittal of the applicant by the High Court in the present case.

[24] It is our finding that the applicant by exhibiting this SD of Dato' Mat Zain showed that the applicant knew about the alleged conspiracy even before Dato' Ramli gave his testimony on 27 May 2015 in the said civil suit. This same evidence on fabrication of evidence was therefore available throughout the hearing of the appeal of the applicant's case at the Federal Court which ended on 7 November 2014.

[25] We are also of the view that the evidence of Dato' Ramli that the applicant applies to be taken by this court is irrelevant to the issues raised by the applicant. There is no nexus between the testimony of Dato' Ramli and the defence of the applicant for his case. We find nothing in the testimony of Dato' Ramli that would disclose any evidence in relation to the applicant's defence of political conspiracy. The evidence of Dato' Ramli would be futile in the circumstances of the case. Given that the case on the black eye incident and the conspiracy to fabricate the evidence on the incident had already been concluded, it would be too remote to admit the evidence on the present applicant's case to support his allegation of political conspiracy which is altogether different in cause of action and relevancy. Even if the evidence is relevant to the applicant's case, it is only relevant to the applicant's previous case of sodomy in 1988.

[26] On the third requirement under the principles of *R v. Parks* we are of the view that the witness statement of Dato' Ramli used in the applicant's affidavit in support of his present application is not credible evidence. This is because the applicant has failed to comply with the statutory requirement of r. 76 of the RFC 1995 rendering the applicant's affidavit amounting to hearsay as it attempts to establish the truth of the contents of the witness statement without the maker, Dato' Ramli, being examined on the subject matter. (See the case of *Subramaniam v. Public Prosecution* [1956] 1 LNS 115; [1956] MLJ 220). Rule 76 of the RFC 1995 provides as follows:

> Upon any motion, petition, application, or summons evidence may be given by affidavit, but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence unless by the leave of the court or a Judge.

[27] It must be stated here that r. 76 of the RFC 1995 clearly requires evidence to be in the form of affidavit and the maker of such affidavit is subject to cross-examination for verification of his statement before it can be used as evidence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. In the present case the applicant has not furnished the witness statement of Dato' Ramli in the form of an affidavit but as an exhibit to the applicant's own affidavit.

[28] We also noted that the witness statement of Dato' Ramli that allegedly incriminates Tan Sri Mohtar bin Abdullah and Tan Sri Abdul Gani Patail in the fabrication of evidence on the black eye incident is also hearsay

A evidence as the matter came to his knowledge through Tan Sri Musa Hassan. In his statement he said that Tan Sri Musa Hassan came to see him to transmit the message that Tan Sri Mohtar Abdullah and Tan Sri Gani Patail had instructed him to lodge a police report against Dato' Seri Anwar Ibrahim to say that Dato' Seri Anwar Ibrahim had lodged a false report against Tan
B Sri Abdul Rahim Noor and to arrange for a doctor to give an expert report that Dato' Seri Anwar Ibrahim had inflicted the injuries on himself.

[29] On the fourth requirement under the principle of *R v. Parks* we are of the view the evidence of Dato' Ramli sought to be adduced by the applicant is insignificant evidence. We do not think that such evidence might cast a
C reasonable doubt in the mind of the judges as to the guilt of the applicant if that evidence had been given together with the other evidence at the trial. The order of acquittal and discharge of the applicant at the end of the defence case by the trial judge was not made on the ground of political conspiracy although the trial judge did consider the said defence.

D **[30]** For the abovestated reasons we find there is no merit in this application. We therefore dismiss the applicant's application.

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